

**BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD
OF THE STATE OF CALIFORNIA**

AB-8872

File: 47-378483 Reg: 07065622

LEWIS JAMES HIBBEN, dba The Boathouse
2685 Lakeshore Boulevard, Nice, CA 95464,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: October 1, 2009
San Francisco, CA

ISSUED JANUARY 5, 2010

Lewis James Hibben, doing business as The Boathouse (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended his license for 20 days, comprising 15 days for selling or furnishing alcoholic beverages to a person under the age of 21, a violation of Business and Professions Code section 25658, subdivision (a), and 5 days for permitting that person to remain in the premises when intoxicated and unable to care for her own safety or the safety of others, a violation of Penal Code section 647, subdivision (f).

Appearances on appeal include appellant Lewis James Hibben, appearing through his counsel, Michael G. Watters, and the Department of Alcoholic Beverage Control, appearing through its counsel, Sean Klein.

¹The decision of the Department, dated April 4, 2008, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on May 11, 2005. On April 26, 2007, the Department filed a two-count accusation against appellant charging the sale of an alcoholic beverage to Jennifer Farr, a person under the age of 21 (count 1), and permitting Farr to remain in the premises when she was intoxicated and unable to care for her own safety or the safety of others (count 2).

At the administrative hearing held on February 27, 2008, appellant admitted the violation charged in count 1. Documentary evidence was received and testimony concerning count 2 was presented by Farr and by Todd Wendschlag, appellant's bartender on the night in question.

Farr testified that she became very intoxicated, consuming as many as 10 drinks, both mixed drinks and beer; that she fell off her barstool twice; that her speech was very slurred when she spoke to sheriff's deputies; that she was able to tell the deputies her name and age, but could not answer other questions they asked her; and that the officers had to stand on either side of her, holding her up, to get her outside to a patrol car. Wendschlag said that he served Farr only two beers; that he only saw her fall off her bar stool once; that he served her nothing after she fell off the bar stool; that she was helped in to the restaurant area as soon as she fell off the bar stool; and that the fall from the bar stool was the first sign of intoxication she showed.

Subsequent to the hearing, the Department issued its decision which determined that both counts of the accusation were established. Appellant then filed an appeal contending there was not substantial evidence supporting the determination that Farr was intoxicated and unable to care for herself.

DISCUSSION

Appellant contends that Farr, the only witness called by the Department, was too intoxicated to remember events clearly from the night in question, and her testimony is inherently not credible. With no credible evidence, appellant argues, there could not be substantial evidence to support the determination that Farr was in violation of Penal Code section 647, subdivision (f).

Penal Code section 647, subdivision (f), provides, in pertinent part:

Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor:

[¶] . . . [¶]

(f) Who is found in any public place under the influence of intoxicating liquor, any drug, controlled substance, toluene, or any combination of any intoxicating liquor, drug, controlled substance, or toluene, in a condition that he or she is unable to exercise care for his or her own safety or the safety of others,

"Substantial evidence" is relevant evidence which reasonable minds would accept as reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Bd.* (1951) 340 U.S. 474, 477 [95 L.Ed. 456, 71 S.Ct. 456]; *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) When an appellant charges that a Department decision is not supported by substantial evidence, the Appeals Board's review of the decision is limited to determining, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. (Cal. Const., art. XX, § 22; Bus. & Prof. Code, §§ 23084, 23085; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113].) In making this determination, the Board may not exercise its independent judgment on the

effect or weight of the evidence, but must resolve any evidentiary conflicts in favor of the Department's decision and accept all reasonable inferences that support the Department's findings. (*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (Masani)* (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826]; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734]; *Gore v. Harris* (1964) 29 Cal.App.2d 821, 826-827 [40 Cal.Rptr. 666].)

It is the province of the administrative law judge (ALJ), as trier of fact, to make determinations as to witness credibility. (*Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640]; *Brice v. Dept. of Alcoholic Bev. Control* (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807].) The Appeals Board will not interfere with those determinations in the absence of a clear showing of an abuse of discretion.

A reviewing court will not hold unsupported the trial court's findings merely because it might reasonably draw different inferences from those the trial court reasonably drew. A reviewing court cannot reject testimony of a witness that has been believed by the trier of the fact unless it is a physical impossibility that it be true, or its falsity is apparent without resorting to inferences or deductions. In order to say that testimony is inherently improbable, it must appear that what was related or described could not have occurred. Testimony which merely discloses unusual circumstances is not inherently improbable. Testimony which is subject to justifiable suspicion does not justify reversal of a judgment. The trier of fact may believe and accept a part of the testimony of a witness, and disbelieve the remainder or have a reasonable doubt as to its effect. On appeal that part which supports the judgment must be accepted, not that part which would defeat, or tend to defeat, the judgment. Unless it clearly appears that upon no hypothesis whatever is there substantial evidence to support a finding of the trier of fact, it cannot be set aside on appeal.

(*Murphy v. Ablow* (1954) 123 Cal.App.2d 853, 858 [268 P.2d 80].)

In the present case, the ALJ resolved the conflicts in the evidence and judged the credibility of the witnesses. He chose to believe, for the most part, Farr's testimony rather than that of the bartender. We cannot say that Farr's testimony was "inherently improbable" or that her description of the events "could not have occurred." (*Murphy v. Ablow, supra.*)

"[T]he testimony of one witness, if believed by the trier of fact and if not inherently improbable, is sufficient to sustain a finding." (*Alperson v. Mirisch Co.* (1967) 250 Cal.App.2d 84, 93 [58 Cal.Rptr. 178].) Farr's testimony, believed by the ALJ, provided substantial evidence for the findings and determination as to Farr's intoxication and her inability to care for her own safety.

ORDER

The decision of the Department is affirmed.²

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

²This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 et seq.